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In The
Supreme Court of the United States

NATIONAL RIGHT TO LIFE COMMITTEE, INC. *et al.*,
Plaintiffs-Appellants/Cross-Appellees,
v.
FEDERAL ELECTION COMMISSION *et al.*,
Appellees/Cross-Appellants

On Appeal from the United States District Court
for the District of Columbia

Brief of Plaintiffs-Appellants/Cross-Appellees National Right to Life Committee *et al.*

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Questions Presented

1. Whether the prohibition of § 101 of the Bipartisan Campaign Reform Act of 2002 (BCRA) on the solicitation, receipt, redirection, or use of "soft money" by any national political party for any communication that "promotes or supports . . . or attacks or opposes" a federal candidate, violates the First and Fifth Amendment and principles of federalism.

2. Whether the prohibition on federal officeholders and candidates from soliciting, receiving, directing, transferring, or spending "soft money" contained in BCRA § 101 violates the First Amendment.

3. Whether the prohibition on state officeholders and candidates from soliciting, receiving, directing, transferring, or spending "soft money" in connection with an election for federal office in BCRA §101 violates the First Amendment.

4. Whether the backup "electioneering communication" definition at BCRA§ 201, or its construction by the district court, violates the First Amendment.

5. Whether the requirements that "disbursements" and "expenditures" be reported as occurring when contracted for, rather than when made, BCRA §§ 201 and 212,[1] are justiciable and violate the First Amendment.

6. Whether the District Court injunction should extend to activities outside the District of Columbia.[1]

7. Whether BCRA § 403(b), permitting members of Congress to intervene, and the permitted intervention by Intervenor-Defendants without regard to whether they have Article III standing, violates the Constitution.

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[1]Question 5, as to § 212 only, and Question 6 are withdrawn.

Parties to the Proceedings

In the case of *McConnell, et al. v. FEC, et al.* (No. 02-582 in the district court), the following plaintiffs were represented by the James Madison Center for Free Speech ("JMC Plaintiffs"): U.S. Representative Mike Pence, Alabama Attorney General Bill Pryor, Libertarian National Committee, Inc. (LNC), Club for Growth, Inc. (CFG), Indiana Family Institute, Inc. (IFI), National Right to Life Committee, Inc. (NRLC), National Right to Life Educational Trust Fund (NRL Ed Fund), National Right to Life Political Action Committee (NRL PAC), Trevor M. Southerland,[2] and Barret Austin O'Brock .[3]

Plaintiffs below in the same action who were not represented by JMC were U.S. Senator Mitch McConnell, former U.S. Representative Bob Bar, American Civil Liberties Union, Associated Builders and Contractors, Inc., Associated Builders and Contractors Political Action Committee, Center for Individual Freedom, National Right to Work Committee, 60 Plus Association, Inc., Southeastern Legal Foundation, Inc., U.S. English d/b/a/ ProENGLISH, Thomas McInerney.

Defendants and Intervenor-Defendants, were the Federal Election Commission (FEC), Federal Communication Commission (FCC), John D. Ashcroft, in his capacity as Attorney General of the United States, the United States Department of Justice; and the United States of America, U.S. Senator John McCain, U.S.

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[2]The Madison Center represented minors Southerland and O'Brock in their successful challenge to the ban on contributions by minors to candidates or political party committees. Mr. Southerland became 18 years of age on May 28, 2003.

[3]Withdrawn Plaintiffs below were Alabama Republican Executive Committee, Libertarian Party of Illinois, Inc., DuPage Political Action Council, Jefferson County Republican Executive Committee, Christian Coalition of America, Inc., and Martin Connors.

Senator Russell Feingold, U.S. Representative Christopher Shays, U.S. Representative Martin Meehan, U.S. Senator Olympia Snowe, and U.S. Senator James Jeffords.

Corporate Disclosure Statement

As stated in the *Jurisdictional Statement*, none of the appellants has a parent corporation and no publicly held company owns ten percent or more of the stock of any of the appellants. Rule 29.6.

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Glossary

BCRA ..... Bipartisan Campaign Reform Act of 2002
CFG ..... Club for Growth
FEC ..... Federal Election Commission
FECA ..... Federal Election Campaign Act
GOTV ..... get out the vote
JA ..... *Joint Appendix*
JDT ..... Joint Deposition Transcripts
JMC Plaintiffs .....
present plaintiffs-appellants/cross-appellees in trial court
JS ..... *Jurisdictional Statement*
JSA ..... *Jurisdictional Statement Appendix*
NRLC ..... National Right to Life Committee
NRL ETF ..... NRL Educational Trust Fund
NRL PAC ..... NRL Political Action Committee
NRLC Plaintiffs .....
present plaintiffs-appellants/cross-appellees in this brief
PCS .. Plaintiffs' Consolidated Evidentiary Submission (cd)
SA ... *Supplemental Appendix to Jurisdictional Statements*

Opinions Below

Lower opinions are at 251 F. Supp. 2d 176 and in the *Supplemental Appendix to Jurisdictional Statements* (SA).

Jurisdiction

Judgment issued May 1, 2003; appeal was noticed May 7. Jurisdiction is under 28 U.S.C. § 1253; BCRA § 403(a)(1).

Constitutional & Statutory Provisions

Relevant provisions are set out in the *Jurisdictional Statement* ("JS") and appendix pages cited. JS at 1-2.

Statement of the Case

Plaintiffs-appellants/cross-appellees represented by the James Madison Center for Free Speech (referred to below as "Madison Center" or "JMC" Plaintiffs) were part of a larger group below on the *McConnell v. FEC* (No. 02-582) complaint. They refer to themselves herein as the "NRLC Plaintiffs."

NRLC Plaintiffs are described in detail in the *Jurisdictional Statement*. They include nonprofit, ideological advocacy organizations, described in the *Per Curiam Opinion* as noted: National Right to Life Committee, Inc. (79sa), National Right to Life Educational Trust Fund (79a), Club for Growth, Inc. (79sa), and Indiana Family Institute. NRLC Plaintiffs include the Libertarian National Committee, Inc. (78sa); National Right to Life Political Action Committee (79sa); federal official and candidate Rep. Mike Pence; state official and candidate Alabama Attorney General William H. Pryor (78sa); and minor Barret Austin O'Brock (80sa).

NRLC Plaintiffs generally adopt the statement of the case of the McConnell Plaintiffs in No. 02-1674, but add the following unique information regarding the challenge to Intervenors' standing. Senators McCain and Feingold, Reps. Shays and Meehan, and Sens. Snowe and Jeffords (Intervenors) moved to intervene under Fed. R. Civ. P. 24(a)(1) and BCRA § 403(b). Docket #6. NRLC Plaintiffs objected that Intervenors lack mandatory Article III

standing. Docket #14. The trial court granted intervention, holding that Intervenors have Article III standing if it is required. Docket #40.

Summary of the Argument

The ban on **"electioneering communication,"** § 201, is unconstitutional as to its primary, its backup, and (the district court's) truncated backup definitions. It violates this Court's binding, substantive decisions in *Buckley v. Valeo* and *FEC v. Massachusetts Citizens for Life* that the First Amendment requires that issue advocacy be protected from government regulation by a bright-line express advocacy test requiring explicit words advocating the election or defeat of a clearly identified candidate. The ban is not narrowly tailored to a compelling interest.

The **soft money bans** in Title I are unconstitutional as to political party committees, federal officials/candidates, and state officials. Libertarian National Committee joins the political parties' brief on the first subject. The ban on soft money fundraising by federal officials and candidates, such as Rep. Pence, for nonprofit ideological corporations, such as Indiana Family Institute, unconstitutionally burdens the rights of free expression and association without being narrowly tailored to a compelling interest. The ban on certain uses of soft money for state officials and candidates, such as Alabama Attorney General William Pryor, unconstitutionally burdens the rights of free expression and association, and hinders the conduct of official duties, without being narrowly tailored to a compelling interest.

BCRA's requirement of **advanced notice** of electioneering communications by treating contracts as communications unconstitutionally burdens free expression without furthering any compelling interest, as noted by the district court.

The trial court erred in **permitting Sen. McCain et al. to intervene** without individual Article III standing.

Argument[4]

I. The "Electioneering Communication" Ban Is Unconstitutional.

The argument over BCRA's electioneering communications ban, JSA 21a, 24a (BCRA §§ 201, 203), is over two views of issue advocacy. Defendants see issue advocacy as affecting elections and insist it should be banned. Plaintiffs see issue advocacy as essential to citizen participation in our democratic republic, guaranteed by the First Amendment, and therefore protected from abridgement – even if it affects elections.[5]

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[4]**Barrett O'Brock** joins the brief of plaintiffs Echols et al. opposing the minors' contributions ban. **Libertarian National Committee** joins the political parties' brief of Republican National Committee et al. In addition to specific notes of adoption here and elsewhere, **NRLC Plaintiffs** generally adopt all consistent briefing on their issues presented by other plaintiffs.

[5]Issue advocacy involves a wide variety of communications, including discussion of issues of public concern and potential legislation, grassroots lobbying for the passage of particular legislation, and praise and criticism of the actions of public official in office and the positions of candidates on issues. However, the "ultimate goal is to affect what the government does, and what Congress does by passing the types of issues [the group supports]." JDT *Deposition of David Keating* 64. This differs from candidate campaigns, whose "ultimate goal" is the election of a candidate. As a result, issue advocacy occurs throughout the year, year after year, often timed to coincide with potential legislative action. While issue advocacy is often done around elections and can certainly influence an election, it is often not done to influence *the outcome* of an election. "The media . . . the public . . . and the general political actors are [often] more attuned," JDT *id.* at 70, to issues at that time and, if an issue is raised in a campaign, it needs to be defended or "the media, the public, or other members of Congress [will] conclude that's a losing issue . . . for them politically [and] we'll never get anything adopted." JDT *id.* at 74. Thus, issue advocacy by advocacy groups has a fundamentally different purpose and effect than candidate

Judges Kollar-Kotelly and Leon used the first viewpoint, upholding the ban. Judge Henderson followed *Buckley v. Valeo*, 424 U.S. 1 (1976), and *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) (*MCFL*), holding that the Constitution mandates the second viewpoint and the ban should be stricken.

Judge Kollar-Kotelly argued that "*Buckley* and *MCFL* ... invoked the express advocacy test *only* as a means of statutory construction," SA 788sa, but acknowledged "the consensus among the judiciary that courts are bound by *Buckley* and *MCFL*, which strictly limit the meaning of 'express advocacy.'" SA 796sa (quotation marks omitted). She dismissed this consensus, however, saying those other cases lacked "textual analysis" and were rife with "dicta." SA 794-99sa. Judge Henderson provided a cogent refutation. SA 345-384sa.

A. A textual analysis of *Buckley* and *MCFL* reveals that this Court, in adopting the express advocacy test, was concerned about protecting issue advocacy, not just vagueness.

1. The first provision *Buckley* considered, § 608(e)(1),[6] imposed spending limits on independent expenditures and was ultimately found unconstitutional. 424 U.S. at 51. Troubled by the vagueness of capping expenditures "*relative to* a clearly identified candidate," the Court first construed "relative to" with the provision's parallel phrase, "advocating the election or defeat of such a candidate." But the resulting phrase, "advocating the election or defeat of a clearly identified candidate," only "refocuse[d]" the vagueness problem in a way that "***only***" prefixing "*explicit words*,"

advertising.

[6]Section 608(e)(1) provided: "No person may make any expenditure *relative to* a clearly identified candidate during a calendar year which, when added to all other expenditures by such person during the year *advocating the election or defeat of such candidate*, exceeds $1,000." (emphasis added)

id. at 42-44 (emphasis added), or "*expressly*" could fix. *Id.* at 80 (emphasis added).[7]

What was the fatal defect this Court sought to avoid when it said that "*advocating*" was too vague absent the"expressly" modifier? The Court immediately answered this question: "[T]he distinction between *discussion of issues and candidates* and ***advocacy** of election or defeat of candidates* may often dissolve in practical application." *Id.* at 42 (emphasis added).

So the dichotomy *Buckley* established in its primary discussion of the express advocacy test was between (1) "discussion of issues and candidates," commonly known as issue advocacy, and (2) "advocacy of election or defeat of candidates," commonly known as express advocacy. This distinction is necessary because "[c]andidates, especially incumbents, are intimately tied to public issues involving legislative issues and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest." *Id.* at 42. In other words, issue advocacy that includes discussion of candidates and issues is essential to citizens' participation in our representative democracy.

This Court then quoted approvingly the Court of Appeals' recognition that issue advocacy would influence elections:

> "Public discussion of public issues which also are campaign issues readily and often unavoidably draws in candidates and their positions, their voting records and other official conduct. Discussions of those issues, and as well more positive efforts to

[7]The express advocacy test is not a "magic words" test, i.e., so long as the words used in *Buckley*'s footnote 52 are avoided, political speakers avoid regulation. *Id.* at 44 n.52. Footnote 52 creates an "express words of advocacy test": "This construction would restrict the application of § 608(e)(1) to communications containing *express words of advocacy* of election or defeat, *such as* 'vote for,' . . . ." *Id.* (emphasis added).

influence public opinion on them, tend naturally and inexorably to exert some influence on voting at elections." [*Id.* at 43 n.50 (citation omitted).]

Issue advocacy, then, includes discussion of candidates and their positions, records, and conduct; it goes beyond mere "discussion" to "more positive efforts to influence public opinion on them." These constitutionally protected actions may "exert some influence on voting at elections," but they are protected nevertheless.

This Court went on in *Buckley* to flesh out the breadth of issue advocacy with a quote from *Thomas v. Collins*, 323 U.S. 516, 535 (1945), indicating that express advocacy cannot depend on intent or effect and that issue advocacy extends to "discussion, laudation, [and] general advocacy," so that only "solicitation" or "invitation" (i.e., "advocacy of election or defeat of candidates") can be regulable express advocacy:

> [W]hether words intended and designed to fall short of *invitation* [to vote for or against a candidate] would miss the mark is a question both of *intent* and of *effect*. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. . . . [T]he supposedly clear-cut distinction between *discussion, laudation, general advocacy, and solicitation* puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.
>
> Such a distinction offers no security for *free discussion*. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim. [*Id.* at 43 (quotation marks and citation omitted) (emphasis added).]

So the "free discussion" that requires the "security" of this Court's express advocacy test is this broadly described issue advocacy. And the reason this Court was concerned with "vagueness" was not only that some language was ambiguous, but that the language substantively regulated this "free discussion." Thus, while the Court spoke of vagueness in these passages, there was an underlying overbreadth concern. The "[t]he constitutional deficiencies described in *Thomas v. Collins* [to be] avoided," *id.* at 43, were not fuzzy words, but the failure to protect "discussion, laudation, [and] general advocacy" (i.e., issue advocacy) from the regulation. "[A]void[ing]" these deficiencies meant avoiding the abridgment of issue advocacy, not avoiding a decision on whether there *were* any deficiencies, as Judge Kollar-Kotelly suggests. SA 789sa. Thus, "[s]o long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views." *Buckley*, 424 U.S. at 45.

Further, since the express advocacy test was narrow and citizens remained free "to promote [a] candidate and his views" through issue advocacy, this Court fully recognized that it was permitting communications that would affect an election:

> It would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefitted the candidate's campaign. [*Id.*][8]

But this Court was permitting such unfettered issue advocacy because it is vital to our representative democracy:

> Discussion of public issues and debate on the qualifications of candidates[, i.e., issue advocacy,] are integral to the operation

[8]So studies purportedly showing that issue advertising affects elections are irrelevant. *Cf.* SA 353sa (Henderson). That effect was considered in *arriving at* the express advocacy test and cannot be used to overturn it.

of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression ... "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." [*Id.* at 14 (citation omitted).]

Thus, "'there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs ... of course includ[ing] *discussions of candidates*.'" *id.* (citation omitted) (emphasis added), including the right of citizens to band together to engage in issue advocacy.[9]

2. The second provision *Buckley* considered, § 434(e), "require[d] direct disclosure of what an individual or group contributes or spends [over $100]" "'for the purpose of ... influencing' the nomination or election of candidates for federal office." *Buckley*, 424 U.S. at 75 (citation omitted). The Court said that "the ambiguity of this phrase ... poses constitutional problems." *Id.* at 77. This Court noted that the vagueness present was of the same sort encountered in dealing with the independent expenditure cap: "[I]t shares the same potential for encompassing both issue discussion and advocacy of a political result." *Id.* at 79. Therefore, the concern about the "ambiguity" was over whether the provision was overbroad for sweeping in protected issue advocacy – the same

[9]*Buckley* recognized the constitutional right of people to associate in ideological corporations for issue advocacy:

> The constitutional right of association ... stemmed from the Court's recognition that effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. Subsequent decisions have made clear that the First and Fourteenth Amendments guarantee freedom to associate with others for the common advancement of political beliefs and ideas, a freedom that encompasses the right to associate with the political party of one's choice. [*Id.* (internal quotation indicators and citations omitted).]

concern this Court had just addressed with respect to § 608(e)(1). As with the prior provision, this Court addressed the overbreath concern by applying the express advocacy test:

> To *insure* that the reach of § 434(e) is *not impermissibly broad*, we construe 'expenditure' for purposes of that section in the *same way we construed the terms of § 608(e)(1)* – to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." [*Id.* at 80 (emphasis added).][10]

MCFL removes any doubt that this Court's "vagueness" concerns in *Buckley* were focused on protecting issue advocacy from overbroad legislation. *MCFL* said that the express advocacy test was imposed on the FECA "expenditure" definition "to avoid problems of overbreadth." 479 U.S. at 248 (citing *Buckley*, 424 U.S. at 80). The dichotomy affirmed in *MCFL* was between "'*discussion of issues and candidates* and *advocacy of election or defeat of candidates*,'" which it established in its introduction of the express advocacy test. *Id.* at 249 (quoting *Buckley*, 424 U.S. at 42) (emphasis added). Removing all doubt, the *MCFL* Court reiterated the dichotomy in other terms with identical meaning:

[10]That this Court's intent was to protect issue advocacy here is further borne out by its plain statement that issue advocacy is not mere discussion: "As narrowed, § 434(e), like § 608(e)(1), *does not reach all partisan discussion* for it only requires disclosure of those expenditures that expressly advocate a particular election result." *Buckley*, 424. U.S. at 80 (emphasis added). This last phrase, "advocate a particular election result" refers solely to that which may be constitutionally regulated under § 608(e)(1), which this Court had just said are expenditures "for communications that expressly advocate the election or defeat of a clearly identified candidate." Consequently "advocate a particular election result" can only mean "expressly advocate the election or defeat of a clearly identified candidate." Judge Kollar-Kotelly's effort to draw a false dichotomy between "issue discussion and advocacy of a political result" must therefore be rejected. SA 792-93sa.

"*Buckley* adopted the 'express advocacy' test to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons." *Id. MCFL* reiterated that the express advocacy test required express words of advocacy, such as those in *Buckley*'s footnote 52, which should remove all doubt that some other "express advocacy" test can be substituted.[11]

In sum, careful textual analysis of *Buckley* and *MCFL* reveals that this Court established the constitutionally-mandated principle that wherever legislation or regulation borders on issue advocacy – whether it is § 608(e)(1), § 434(e), or § 441b – issue advocacy must remain unfettered and protected by a bright-line test that requires explicit words expressly advocating the election or defeat of a clearly identified candidate.

Thus, Judge Kollar-Kotelly unsurprisingly discovered a "consensus among the judiciary that courts are bound by *Buckley* and *MCFL*, which strictly limit the meaning of express advocacy." SA 796sa (internal quotation marks omitted).[12] And perhaps the

[11]*MCFL*'s discussion of the express advocacy in MCFL's newsletter does not expand the reach of the express advocacy test. The newsletter identified pro-life candidates and urged the reader to "vote pro-life." This Court said this "provides *in effect* an explicit directive" and the slightly less direct exhortation "does not change its *essential* nature." *Id.* at 249 (emphases added). But this does not establish a test looking to the "effect" or "essence" of a communication, only that if A=B and B=C, then A=C.

[12]Lower federal court cases recognizing constitutional protection for unfettered issue advocacy and the constitutional mandate for the express advocacy test include: *Me. Right To Life Comm. v. FEC*, 98 F.3d 1 (1st Cir. 1996); *Faucher v. FEC*, 928 F.2d 468 (1st Cir. 1991); *Vt. Right to Life Comm. v. Sorrell*, 221 F.3d 376 (2d Cir. 2000); *FEC v. Cent. Long Island Tax Reform Immediately Comm.*, 616 F.2d 45 (2d Cir. 1980); *Virginia Society for Human Life v. FEC*, 263 F.3d 379 (4th Cir. 2001) (*VSHL II*); *Perry v. Bartlett*, 231 F.3d 155 (4th Cir. 2000); *N.C. Right To Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999); *Va. Soc'y For Human Life v. Caldwell*, 152 F.3d 268 (4th Cir. 1998); *FEC v. Christian Action Network*, 92 F.3d 1178 (4th Cir. 1996) (*CAN I*); *FEC v. Christian Action Network, Inc.*, 110 F.3d 1049 (4th Cir. 1997) (*CAN II*); *Chamber of Commerce v. Moore*, 288 F.3d 187 (5th Cir. 2002); *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503 (7th Cir. 1998); *Iowa Right to Life Comm. v. Williams*, 187 F.3d 963 (8th Cir. 1999); *California Pro-Life Council v. Getman*, 328 F.3d 1088 (9th Cir. 2003); *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987); *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174 (10th Cir. 2000); *Fla. Right to Life v. Lamar*, 238 F.3d 1288 (11th Cir. 2001) (affirming *Fla. Right to Life v. Mortham*, No. 98-770CIVORL19A, 1999 WL 33204523 (M.D. Fla. 1999)). *FEC v. Colo. Republican Fed. Campaign Comm.*, 839 F. Supp. 1448 (D. Colo. 1993), *rev'd*, 59 F.3d 1015 (10th Cir. 1995), *vacated and remanded on other grounds*, 518 U.S. 604 (1996); *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999); *FEC v. NOW*, 713 F. Supp. 428 (D.D.C. 1989); *FEC v. AFSCME*, 471 F. Supp. 315 (D.D.C. 1979); *Kansans for Life, Inc. v. Gaede*, 38 F. Supp. 2d 928 (D. Kan. 1999); *Clifton v. FEC*, 927 F. Supp. 493 (D. Me. 1996), *aff'd on other grounds*, 114 F.3d 1309 (1st Cir. 1997); *Planned Parenthood Affiliates of Mich. v. Miller*, 21 F. Supp. 2d 740 (E.D. Mich. 1998); *Right to Life of Mich., Inc. v. Miller*, 23 F. Supp. 2d 766 (W.D. Mich 1998); *N.C. Right to Life, Inc. v. Leake*, 108 F. Supp. 2d 498 (E.D.N.C. 2000); *Right To Life of Dutchess County, Inc. v. FEC*, 6 F. Supp. 2d 248 (S.D.N.Y. 1998); *FEC v. Survival Educ. Fund*, No. 98 Civ. 0347, 1994 WL 9658, (S.D.N.Y. Jan. 12, 1994), *aff'd in part and rev'd in part on other grounds*, 65 F.3d 285 (2d Cir. 1995); *Oklahomans for Life v. Luton*, No. CIV-00-1163, slip. op. (W.D. Okla. May 25, 2001); *West Virginians For Life, Inc. v. Smith*, 919 F. Supp. 954 (S.D. W. Va. 1996). *But cf. Wisconsin Realtors Ass'n v. Ponto*, 233 F. Supp. 2d 1078 (W.D. Wis. 2002); *Nat'l Fed'n of Republican Assemblies v. United States*, 218 F. Supp. 2d 1300 (S.D. Ala. 2002).

State cases recognizing constitutional protection of unfettered issue advocacy include: *In Re Texas Association of Business*, (no number) (167th Judicial Dist. Ct. of Travis County, Texas) slip. op. at 1-4 (order denying motion to quash grand jury subpoenas and protective order), *appeal docketed*, No. 56,045-01, (Tex. Crim. 2003) (*Cf. Aides Shielded From Grand Jury Probe, U.S. Chamber Tells Texas Criminal Court*, Money & Politics Report, June 26, 2003); *Governor Gray Davis Committee v. American Taxpayers Alliance*, 125 Cal. Rptr. 2d 534 (2002); *Osterberg v. Peca*, 12 S.W.3d 31 (Tex. 2000); *Wash. State Republican Party v. Wash. State Public Disclosure Comm'n*, 4 P.3d 808 (Wash. 2000); *Alaska v. Alaska Civil Liberties Union*, 978 P.2d 597 (Alaska 1999); *Brownsburg Area Patrons Affecting Change v. Baldwin*, 714 N.E. 2d 135 (Ind. 1999); *Elections Bd. v.*

textual analysis she found lacking in the myriad federal and state, trial and appellate, decisions was missing because courts seeking to follow this Court's holdings, not avoid them, found that simply reading *Buckley* and *MCFL* readily reveals that the Constitution and the needs of the republic mandate the express advocacy test to protect unfettered issue advocacy – as does the textual analysis here provided.

B. "Dicta," is the another means by which Judge Kollar-Kotelly sought to dismiss the acknowledged "consensus" of other courts, along with attempting to distinguish some cases. SA 796-99sa. One response to the alleged "dicta" in other federal courts is that it doesn't matter because the careful textual analysis set out above establishes what *this* Court said, and that holding governs. Another response notes the irony of Judge Kollar-Kotelly rejecting as "dicta" the judicial "consensus" while relying on two trial court opinions where discussion of the express advocacy test was so obviously obiter dictum.[13]

However, all federal appellate courts addressing the issue have concluded that *Buckley* established express advocacy as the constitutional standard for regulable political speech. "These courts rely primarily on *Buckley*'s emphasis on (1) the need for a bright-line rule demarcating the government's authority to regulate speech and (2) the need to ensure that regulation does not impinge

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Wisconsin Mfr. & Commerce, 597 N.W.2d 721 (Wisc. 1999); *Klepper v. Christian Coalition*, 259 A.D.2d 926 (N.Y. App. Div. 1999); *Doe v. Mortham*, 708 So. 2d 929 (Fla. 1998); *Va. Soc'y for Human Life v. Caldwell*, 500 S.E.2d 814 (Va. 1998); *Conn. v. Proto*, 526 A.2d 1297 (Conn. 1987).

[13] *Wisconsin Realtors Ass'n*, 233 F.Supp.2d at 1085 (questioning in obiter dictum whether the express advocacy test is "*the* definitive test" but noting that issue advocacy is plainly protected from regulators); *Nat'l Fed'n of Republican Assemblies*, 218 F. Supp. 2d at 1325 (questioning in obiter dictum whether the express advocacy test is constitutionally mandated).

on protected issue advocacy." *Chamber of Commerce*, 288 F.3d at 193. *See*, e.g. *VSHL II*, 263 F.3d at 391-92 ("shift[ing] the focus of the express advocacy determination away from the words themselves to the overall impressions of the hypothetical, reasonable listener or viewer . . . is precisely what *Buckley* warned against and prohibited"); *Citizens for Responsible Gov't*, 236 F.3d at 1187, 1193-95 (statutes unconstitutional that cannot be construed to apply "only to expenditures for communications that contain explicit words advocating the election or defeat of a clearly identified candidate"); *Vermont Right to Life Comm.*, 221 F.3d at 386 (finding parties "in essential agreement that the disclosure provisions . . . and reporting provisions . . . *are necessarily unconstitutional* unless they apply only to [communications] 'that expressly advocate the election or defeat of a clearly identified candidate.'" (emphasis added) (quoting *Buckley*, 424 U.S. at 80)); *Iowa Right to Life Comm.*, 187 F.3d at 969-70 ("communication must contain express language of advocacy with an exhortation to elect or defeat a candidate," and "[t]he Supreme Court has made clear that a 'finding of "express advocacy" depend[s] upon the use of language such as 'vote for,' 'elect,' 'support,' etc.") (quoting *MCFL*, 479 U.S. at 249 (quoting *Buckley*, 424 U.S. at 44, n. 52))); *Brownsburg Area Patrons Affecting Change*, 137 F.3d at 506 ("[*Buckley*] recognized the important First Amendment interest in protecting political speech, including discussions surrounding elections and candidates.... Because of the vital importance of protecting such speech, the *Buckley* Court articulated what has come to be known as the 'express advocacy' test ...."); *Faucher*, 928 F.2d at 470 ("The Supreme Court, recognizing that such broad language . . . creates the potential for first amendment violations, sought to avoid future conflict by explicitly limiting the statute's prohibition to "express advocacy.").

Even the Ninth Circuit in *Furgatch*, 807 F.2d at 857, recognized the binding nature of the express advocacy test, although in dicta it discussed the test in ways that seemed broader than the Supreme Court's articulation of the test.[14] Moreover, the Ninth Circuit has just affirmed that it fully embraces the *Buckley* formulation, by declaring that "a close reading of *Furgatch* indicates that we presumed express advocacy must contain some explicit *words* of advocacy." *California Pro-Life Council*, 328 F.3d at 1097 (emphasis in original). This ruling eliminates any arguable federal circuit court support for dividing issue advocacy from express advocacy with a contextual approach, as do both of the BCRA "electioneering communication" definitions.[15]

The variety of laws, regulations, and fact patterns in which the express advocacy test has been applied demonstrates, not an opportunity for distinguishing, but rather the broad principle that in *whatever* situation government attempts to restrict speech on the border of issue advocacy, it must employ this Court's express advocacy test to avoid abridging free expression and association.[16]

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[14]*Cf. CAN II*, 110 F.3d at 1054 (*Furgatch*'s holding is: "where political communications . . . include an explicit directive to voters to take some [unclear] course of action, . . . 'context' . . . may be considered in determining whether the action urged is the election or defeat of a . . . candidate . . . ."

[15]Ironically, Judge Kollar-Kotelly repudiated *Furgatch*, the only opinion that formerly gave some support to the two contextual definitions of "electioneering communication" in BCRA. 795sa.

[16]Judge Kollar-Kotelly attempted to distinguish all the cases striking down FEC regulations on the basis of one quote from *VSHL II*, 263 F.3d at 392, which declared "that courts 'are bound by *Buckley* and *MCFL*, which strictly limit the meaning of 'express advocacy.' If change is to come, *it must come from an imaginative Congress or from further review by the Supreme Court*.'" 796sa (quoting *VSHL II*, *supra*) (emphasis in opinion).

But the Fourth Circuit's statement was made in direct response to the FEC's claim that "'if the express advocacy requirement is read too narrowly, the prohibitions of 2 U.S.C. [§] 441b will require little more than careful

The more distinctions that are noted, the broader this principle grows.

C. Stare decisis requires this Court to follow its holdings in *Buckley* and *MCFL* that whenever government regulates on the border of issue advocacy it must protect issue advocacy from abridgment by employing the express advocacy test.

Neither holding has been "undermined by subsequent changes or development in the law." *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989) (citations omitted). To the contrary, the express advocacy test has been woven into the web of cases that form the judicial "consensus" that Judge Kollar-Kotelly conceded. SA 796sa.[17] As noted, even the Ninth Circuit on May 8, 2003, noted the array of opinions criticizing its seeming failure to fully embrace this Court's express advocacy test and affirmed that it indeed utilizes the "explicit *words* of advocacy" test, just as everyone else. *California Pro-Life Council*, 328 F.3d at 1097

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diction and will do almost nothing to prevent millions of dollars from the general treasuries of unions and corporations from directly influencing federal elections, and from doing so without disclosing to the public the source of the influence.'" *VSHL II*, 263 F.3d at 392 (citation omitted). This is the same argument the FEC and other Defendants now make, but the Fourth Circuit rejected it by asserting that *Buckley* and *MCFL* are binding substantive law. That rejection does not support Judge Kollar-Kotelly's effort to distinguish this line of cases as being about agency authority instead of constitutional mandate.

[17]Furthermore, Congress has embraced the express advocacy test, 2 U.S.C. § 431(17) ("independent expenditure" definition), as have many states through their statutes. *See, e.g.*, Alaska Stat. §§ 15.13.400(6)(C)(4) and (6)(C)(7) (2003); Cal. Gov't Code § 82031 (2003); Del. Code Ann. tit.15, § 8002(10) (2002); Idaho Code § 67-6602(g) (2003); Iowa Code § 56.2(14) (2003); Kan. Stat. Ann. §§ 25-4143(g)(1)(B) and (h) (2002); Ky. Rev. Stat. Ann. § 121.015(12) (2002); Minn. Stat. § 10A.01(18) (2002); Miss. Code Ann. § 23-15-801(j) (2003); Nev. Rev. Stat. 294A.004 (2003); N.H. Rev. Stat. Ann. § 664:2(XI) (2002); Wis. Stat. § 11.01(16) (2002).

(emphasis in original).[18] As this Court said of the abortion right in *Planned Parenthood of S.E. Penn. v. Casey*, 505 U.S. 833 (1992), this Court's express advocacy test has been relied upon and woven into the fabric of American law and the lives of numerous citizen groups.

The express advocacy test has not proven to be a "positive detriment[s] to coherence and consistency in the law" because its "conceptual underpinnings" have been weakened or because "later law has rendered it irreconcilable with competing legal doctrines or policies." *Patterson*, 491 U.S. at 173 (citations omitted). Rather, the courts have consistently followed this Court's holdings, creating a judicial "consensus" around the express advocacy test.

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[18]Unfettered issue advocacy enjoys international support, which this Court found weighty in In *Lawrence v. Garner*, 539 U.S. ___, 2003 WL 21467086 (2003) (reversing *Bowers v. Hardwick*, 478 U.S. 186 (1986) (citing a 1981 European Court of Human Rights decision). The same court cited in *Lawrence* also decided in *Bowman v. United Kingdom*, 26 Eur. Ct. H.R.1, ¶ 48 (1986), that a London woman could not be charged with a campaign law violation for distributing 1.5 million copies of a voter guide telling voters where candidates stood on abortion (without expressly advocating anyone's election), even though it was a "single issue" guide that was assumed to be "distributed with a view to promoting the election of the candidate with the stand on abortion most acceptable to the [plaintiff]" and "might in fact have the tendency to influence certain voters in different directions," *id.* ¶ 46, because "freedom of expression constitutes one of the essential foundations of a democratic society, *id.* ¶ 45, and the government had failed to prove that such "'single issue' campaigning . . . would distract voters from the political platforms which are the basis of national party campaigns to such a degree as would hinder the electoral process," i.e., "'distort' election results." *Id.* ¶ 47. *See also Harper v. Canada*, 2002 ABCA 301 (2002) (declaring that a "polling day blackout" on "election advertising" is unconstitutional and striking "election advertising" definition, i.e., "tak[ing] a position on an issue with which a registered party or candidate is associated," *id.* ¶ 181, under the "minimal impairment" test because the definition "encroach[es] upon the freedom of expression of those who seek to voice public concerns which are inconsequential to partisan advocacy," *id.* ¶ 184).

Nor has the express advocacy test or its reasoning become "outdated after being 'tested by experience'" or "found to be inconsistent with the sense of justice or with the social welfare." *Id.* (citations omitted). As already noted, this Court foresaw that issue advocacy would affect elections, which is the subject of Defendants' studies, and already considered that fact in endorsing the express advocacy test, which it created to give issue advocacy necessary breathing room. This makes Defendants' studies irrelevant. And a "sense of justice" and the "social welfare" require that the very essence of our system of participatory government not be destroyed by incumbent politicians seeking to silence the amplified voice of the people about these politicians and their actions in office.

Stare decisis is "a cornerstone of our legal system," *Webster v. Reproductive Health Services,* 492 U.S. 490, 518 (1989), that promotes "the evenhanded, predictable, and consistent development of legal principles, reliance on judicial decisions, and the actual and perceived integrity of the judicial process," and it strongly counsels against reconsidering precedent. *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 63 (1996) (quoting *Payne v. Tennessee,* 501 U.S. 808, 827 (1991)) (ellipses omitted).

Even in constitutional cases, stare decisis "carries such persuasive force" that this Court always requires "special justification" to depart from precedent. *Dickerson v. United States,* 530 U.S. 428, 443 (2000) (quoting *United States v. International Business Machines Corp.,* 517 U.S. 843, 856 (1996)). There is no "special justification" for overruling the express advocacy test of *Buckley* and *MCFL. Buckley* and *MCFL* were not "a solitary departure from established law," *Seminole Tribe,* 517 U.S. at 66; rather, they were a logical extension of established law. The express advocacy test has proven to be a workable and well-reasoned decision, *Payne,* 501 U.S. at 828-30, and created no confusion in the lower

courts, except perhaps the court below. For those intent on following this Court's mandates about the dictates of the First Amendment and the needs of the republic, the express advocacy test is a bright line without confusion, and it has fulfilled its purpose – protecting issue advocacy from regulation. It should be retained, as the overwhelming number of federal and state courts have done in weaving a judicial "consensus."

D. The primary "electioneering communication" definition is therefore unconstitutional for flouting this Court's express advocacy test.[19] The primary "electioneering communication" definition provides for a 30/60-day blackout period when corporations and labor unions may not use general funds to broadcast communications that simply name a federal candidate. § 201(a)(i). Only Judge Kollar-Kotelly considered this constitutional. SA 12sa. Similar "name or likeness" provisions have been struck down by federal courts. *See, e.g., Perry v. Bartlett*, 231 F.3d 155, 159 (4th Cir. 2000); *Vermont Right to Life Committee v. Sorrell*, 221 F.3d 376, 389-90 (2d Cir. 2000); *Right To Life of Michigan, Inc. v. Miller*, 23 F. Supp. 2d 766 (W.D. Mich. 1998); *Planned Parenthood Affiliates of Michigan, Inc. v. Miller*, 21 F. Supp. 2d 740 (E.D. Mich. 1998). These federal courts have consistently pointed to this Court's express advocacy test as controlling

The primary "electioneering communication" definition is also not narrowly tailored to a compelling interest. While this Court held that there is a compelling interest that permits regulating express

[19]Judge Henderson rightly noted that "refers to" in the primary "electioneering communication" definition is also vague, SA 359sa, as Plaintiffs complained. Docket # 63 (McConnell Plaintiffs' *Second Amended Complaint* ¶ 50). Judge Kollar-Kotelly's defended "refer" by asserting that, while "refer" can mean "relate," "relate" can be defined as making "clear and specific mention." SA 802sa n.116. But the district court failed to so construe the primary definition, leaving it vague.

advocacy, it found no such interest for issue advocacy. *See Buckley*, 424 U.S. at 80. But the 30/60-day definition suppresses both issue advocacy and express advocacy within the gag periods, thereby failing both the compelling interest and narrow tailoring prongs of strict scrutiny. [20]

Judge Kollar-Kotelly tries to justify the ban[21] by claiming (1) that corporations and unions are actually *doing* issue advocacy (which this Court said the First Amendment and our system of government guaranteed that they could do), (2) that, when politicians are *grateful* for issue advocacy they find beneficial, this creates an appearance of corruption that must be stopped, and (3) that many of the issue ads that this Court said were protected by the First Amendment and our system of participatory government are run *near elections*. SA 804-23sa.

[20]"Government may not suppress lawful speech as the means to suppress unlawful speech." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S. Ct. 1389, 1404 (2002).

[21]As Judge Henderson rightly notes, SA 347sa n.142, this Court's decision in *MCFL* rejects the argument that the restriction on use of general funds is not truly a "ban" because it allows for advocacy with a segregated fund by noting that such a prohibition is a "substantial" restriction. 479 U.S. at 252. In any event, it is a total "ban" on the use of general funds, which are much easier for nonprofit ideological corporations to acquire than general funds. SA 347sa n.142, noting unrebutted evidence of the burden the PAC limitation would place on nonprofit organizations because of the inability to raise funds commensurate with the support of their members for the organizations' advocacy. Nor is this fact altered by this Court's decision in *FEC v. Beaumont*, 123 S. Ct. 2200 (2003), which dealt with the unique issue of corporate contributions, not expenditures. *Beaumont* expressed concern about "war chests" and "conduits,"neither of which is applicable to expenditures (because independent expenditures are unlimited and do not flow to candidates), leaving only quid pro quo concerns, which do not apply to independent expenditures. *Buckley*, 424 U.S. at 47.

As to her first and third major points, since the textual analysis above establishes that corporations and labor unions are constitutionally entitled to discuss candidates and issues in ways that may affect elections, there can be no compelling interest in stopping them from doing a lot of it at election time, when people are especially attuned to things political and public issues (from which most promptly tune out immediately after the elections). SA 236sa (Henderson's alternative finding of fact, quoting RNC political operations director Terry Nelson and finding that "issue advocacy is not as effective in August of an election year as it is in October or early November").

Finally, Judge Kollar-Kotelly believes there is a compelling interest in regulating issue advocacy that might "earn the candidate's gratitude" because it might create the appearance of corruption. SA 854sa. Judge Leon agrees. SA 1135sa. However, gratitude is a natural and salutary human reaction to support or praise, and officials without gratitude to supporters has traditionally been considered to have a character flaw. Candidates are grateful for all forms of help or support, not just praise through issue advocacy. Gratitude is inherent in our system of representative government, so that the only way to eliminate the gratitude a politician ought to feel toward her supporters is to eliminate democracy itself.[22] And if

[22]The Framers already thought of "gratitude," and it cuts the wrong way for Defendants. A *Federalist* paper dealt with the charge that Members of Congress would "be most likely to aim at the ambitious sacrifice of the many to the aggrandizement of the few." *The Federalist* No. 57 (Alexander Hamilton or James Madison) . But the author specifically listed "gratitude" as one of the reasons this would *not* happen. "[W]hat is to restrain the House of Representatives from making legal discriminations in favor of themselves and a particular class of the society? . . . Duty, *gratitude*, interest, ambition itself, are the chords by which they will be bound to fidelity and sympathy with the great mass of the people." *Id.* (emphasis added). Thus, gratitude to the "great mass of the people," who support and put them in office, provides the natural checks and balances and is already built into "the genius of the whole system." *Id.*

"gratitude" creates the appearance of corruption, Congress itself must be corrupt, because "logrolling" is a way of life.

The lower court believed this "gratitude" for issue advocacy would translate into "access," which it claims is inherently corrupt . *See, e.g.*, SA 1135sa (Leon). But if that were true, then lobbying would be inherently corrupting unless officials provide equal time for all views. And the standard political practice of charging for fundraising events, where one meets a candidate or public official, would also be viewed as inherently corrupting.[23] So the key is not whether politicians are grateful to supporters and therefore willing to meet and talk with them, but whether politicians would *only* meet with people after extracting campaign support. Candidates and public officials do the opposite, holding town hall meetings, visiting coffee shops, and meeting all the constituents possible, regardless of such support.

And people get to meet with candidates and public officials for many reasons. Celebrities from entertainment and sports, reporters and editorial boards of prominent newspapers, and influential community leaders can influence elections and get special access to elected officials as a result. What about campaign volunteers,

[23]In *FEC v. Colorado Republican Federal Campaign Committee*, 41 F. Supp. 2d 1197 (D. Col. 1999), the court noted that the "FEC highlights the various party-donor programs and the benefits and access to Members of Congress which a contributor gains by giving at various levels," *id.* at 1203, but noted that precedent did not support a claim that this is corruption:

> *Buckley* . . . recognized that money, in many cases, may grant access to a candidate. It did not, however, conclude that such access is akin to corruption or the appearance of corruption. The FEC seeks to broaden the definition of corruption to the point that it intersects with the very framework of representative government. Corruption cannot be defined so broadly."[*Id.* at 1209.]

political consultants and fundraisers for a campaign? They influence elections and get access to the candidate. If access itself is evil when granted to supporters by grateful politicians, then BCRA is unconstitutionally underinclusive, vitiating any asserted interest in preventing corruption. *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) (judicial candidate rules underinclusive).

E. The backup "electioneering communication" definition is unconstitutional – both as truncated by the district court at Judge Leon's insistence and as drafted, because it also violates this Court's express advocacy test – is vague, and it is not narrowly tailored to a compelling interest. Further Judge Leon's truncation definition is beyond judicial construction authority.

In a splintered decision, the district court decided that " 'electioneering communication' means any broadcast, cable, or satellite communication which promotes or supports a candidate . . . or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)." § 201(f)(3)(A)(ii).[24]

By amputating the last clause, the court made a vague definition vaguer, a broad definition broader. The last clause – "and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate" – surely had the vagueness problems that Judge Leon identified. But it at least required that any "attacking or promoting" of candidates have something to do with elections, i.e., "an exhortation to vote" for or

[24]The district court entered judgment "for Defendants with regard to [Section 203's] applicability to the backup definition of "electioneering communication" as defined in Section 201 of BCRA, in accordance with Judge Leon's Memorandum Opinion." SA 1382sa (Final Judgment); *see also* SA 12sa (Per Curiam). Judge Leon upheld the constitutionality of the definition of "electioneering communication" only without the final clause, which he held to be unconstitutionally vague. SA 1165-66sa.

against a candidate. However, amputating this qualifier leaves the definition with no language requiring that the candidate be "clearly identified" and with no language focusing the communication on voting in elections. The result is that a broadcast communication is banned by corporations or labor unions only if it attacks or promotes someone who happens to be "a candidate" (whether or not known to be so), and has nothing necessarily to do with any exhortation, voting, or even an election. This is confirmed by the parenthetical material of the definition, which proclaims that "promotes or supports" or "attacks or opposes" are not compassed by the limitations of either express advocacy or voting , i.e., "(regardless of whether the communication expressly advocates a vote for or against a candidate)."

As a result, the truncated backup definition is entirely governed by four unqualified, undefined verbs: *promote*, *support*, *attack*, and *oppose*. Dictionary definitions reveal the breathtaking scope of what is prohibited, as well as the vagueness inherent in choosing among possible meanings.

Judge Leon declared that the phrase he excised "depends on a number of variables such as the context of the campaign, the issues that are the centerpiece of the campaign, the timing of the ad, and the issues with which the candidates are identified." SA 1164sa. The remaining four verbs depend on similar contextual, subjective vagaries for determination, but they have the further problem of having nothing to do with any election, election campaign, or exhortation to vote. The truncated backup definition speaks not of supporting or opposing a candidate's *election*, but only of supporting or opposing *a candidate*. Judge Leon declared that truncating the definition "assures that there will be no . . . effect on political discourse *unrelated* to federal elections," SA 1165sa (emphasis in original), but his truncated definition leaves nothing to *relate* the communication to any federal elections.

Judge Leon's view is that communicators only need to stick to "neutral" statements to avoid opposing or supporting a candidate. SA 1163sa. But what is "neutral" is subjective, too. Some would consider simply labeling a legislator (and a candidate) as "pro-life" or "pro-choice" to be supporting or opposing the candidate. Others would declare that supporting or opposing a human cloning bill amounts to supporting or opposing the candidate. To solve just such problems and to keep speakers from having to "hedge and trim," this Court created the "express advocacy" test as the "only" way to eliminate overbreadth and vagueness when legislating on the border of issue advocacy, *infra*, which the "electioneering communication" definition specifically disclaims.

Judge Leon also suggested that communicators could simply never use a candidate's name or they could get an FEC advisory opinion before communicating. SA 1166sa. This means that a citizen group could never broadcast a communication encouraging citizens to call Senator X to vote for or against a bill. The FEC could never issue advisory opinions fast enough to keep up with the fast-breaking, changing need for broadcasting grassroots lobbying communications during an active legislative session.[25] Such limitations impose enormous burdens on core political speech without constitutional warrant.[26]

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[25]Similarly, Judge Leon's use of the AFL-CIO advertisement entitled "No Two Way" as an example of a communication that is not "neutral" because it "attacks [a legislator's] position on the federal budget," reveals the incredible breadth of the concept of oppose/attack in the truncated backup definition. SA 1163sa.

[26]The statutory truncation was beyond the district court's authority. Don Simon of Common Cause, a principle drafter of BCRA, is quoted in a *USA Today* article entitled "Campaign finance hit by ruling" (May 4, 2003) as saying of the truncated definition" that "[w]e got more from the court than we ever could have gotten from Congress" and that "people haven't come to grips with . . . how sweeping it is." "'Unless it is evident that the

As originally enacted, the backup "electioneering communication" definition is also unconstitutional. Judge Kollar-Kotelly ardently defended the primary "electioneering communication" definition, then grudgingly joined Judge Leon's support for the backup definition to make a majority to uphold the ban. SA 885-86sa. Her argument for the primary definition encapsulates why the backup definition is unconstitutional: "The expert testimony in this case demonstrates the subjective nature of the effort of trying to capture mental impressions of viewers, and illustrates how one person's genuine issue advertisement can be another's electioneering commercial." SA 768sa. She refused to consider whether "a series of advertisements" would be "unfairly captured" by BCRA, because this would "ask[] the Court to sit as the viewer and find that these advertisements were pure issue advocacy." SA 855sa (although she inconsistently decided elsewhere whether ads were "genuine" or not, SA 859sa). As justification, she said, "The *Buckley* Court warned against a statutory test that relied on the viewer and listener's interpretation of a political message. I have declined, therefore, to engage in this exercise." SA 855sa.

That is the exercise the backup definition calls for with its unconstitutional contextual approach. This Court mandated express words of advocacy, and nothing else suffices to protect the right of the people to participate in our system of government as guaranteed by the First Amendment.

Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.'" *Buckley,* 424 U.S. at 108-09 (quoting *Champlin Refining. v. Corporation Comm'n of Oklahoma,* 286 U.S. 210, 234 (1932)). Because the truncated definition is more expansive than the definition Congress enacted, it is certain that Congress would not have enacted the definition as truncated.

Real-life illustrations from Plaintiffs's experience demonstrate the sort of unconstitutional problems the backup definition imposes. During this litigation, National Right to Life Committee (NRLC) has been in the midst of congressional legislative battles to ban human cloning, to pass the federal Unborn Victims of Violence Act, and to pursue other legislative interests.[27] As part of these campaigns, NRLC planned to run broadcast advertisements in the Congressional districts of key Members of Congress, naming the members of Congress, many or all of whom are candidates, that could be viewed as attacking or promoting their positions on these legislative issues. The ads would be paid for with general corporate funds and would be similar to the AFL-CIO advertisement, "No Two Way," that Judge Leon found "not neutral." SA 1163sa. Consequently, these ads would be "electioneering communications" and NRLC would be prohibited from broadcasting them.

Nor does the truncated language solve the problem. If, contrary to *Buckley*, citizen groups are left to be judged by what others might think of their communications, how will they know when, where, and who will decide that a communication "is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate"? "Suggest" means: "1. To offer for consideration or action .... 2. To bring or call to mind by logic or association; evoke .... 3. To make evident indirectly; intimate or imply .... 4. To serve as or provide a motive for; prompt or demand ...." *American Heritage Dict. Eng. Lang.* (4th Ed. 2000) <http://www.bartleby.com/61/98/S0869800. html> (visited June 27, 2003).[28]

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[27] *See, e.g.*, <http://www.capwiz.com/nrlc/issues/alert/?alertid=1366326&type=CO> (NRLC legislative action page urging contacts with legislators) (visited May 7, 2003).

[28] Synonyms of "suggest" are:

imply, hint, intimate, insinuate. These verbs mean to convey thoughts or ideas by indirection. Suggest refers to the calling of something to mind as the result of an association of ideas .... To imply is to suggest a thought or an idea by letting it be inferred from something else, such as a statement, that is more explicit . . . . Hint refers to an oblique or covert suggestion that often contains clues .... Intimate applies to indirect, subtle expression that often reflects discretion, tact, or reserve .... To insinuate is to suggest something, usually something unpleasant, in a covert, sly, and underhanded manner .... [*Id.*]

Such imprecision "offers no security for free discussion ... blankets with uncertainty what may be said . . . and compels the speaker to hedge and trim." *Buckley*, 424 U.S. at 43 (quotation marks and citation omitted).

Similarly, Club for Growth, Inc. (CFG) broadcasted advertisements supporting President Bush's tax cut. One named candidate Sen. Tom Daschle and became the subject of a complaint by the Democratic Senatorial Campaign Committee to the FEC while the truncated backup "electioneering communication" definition was in place. Letter from Marc E. Elias, Counsel for DSCC, to Lawrence Norton, FEC General Counsel (May 13, 2003).[29] CFG believes its advertisement is "neutral" and lawful, bit the advertisement depicts a federal candidate and could be considered by someone (as happened with the DSCC complaint) as not "neutral" under Judge Leon's criterion for the truncated backup definition, or as opposing or attacking the candidate and "suggestive" to some audience of no other meaning than an exhortation to vote against Sen. Daschle.

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[29] The complaint letter gives the following text of the ad:

President Kennedy cut income taxes and the economy soared.
President Reagan cut taxes more and created fifteen million new jobs.
President Bush knows tax cuts create jobs, and that helps balance the budget.
But Senator Tom Daschle opposes the president.
South Dakota has lost thousands of jobs, and president Bush has a plan to help.
Tell Tom Daschle to support the Kennedy/ Reagan/ Bush tax policy that will bring jobs back to South Dakota. [*Id.* at 2].

BCRA's own advocacy groups, who pushed it through Congress, demonstrate the lack of a compelling interest in preventing corruption and the appearance of corruption for BCRA's "electioneering communication." These groups engaged in the same sort of activity as NRLC and other citizen groups, but insist that what they did was not corrupting.

Common Cause and Campaign for America promoted BCRA with the same style of issue advocacy NRLC used to oppose BCRA.[30] These "reformers" promoted BCRA by arguing that issue advocacy is corrupting, but under oath in depositions in this case they insisted that their activity was done with legitimate legislative purpose and was noncorrupting. This story is told for its irony and the proposition that assertions under oath are more credible – there is no corruption here.

NRLC has a long history of opposing the sort of campaign finance legislation that became BCRA. JA 636-645 (*Declaration of David N. O'Steen, Ph.D., Executive Director, National Right to Life Committee, Inc.*, (*NRLC Dec.*)). Since 1996, NRLC has scored congressional votes against BCRA-style campaign finance legislation along with votes against abortion, infanticide, assisted suicide, and euthanasia as votes aligned with NRLC's position. JA 88, 8 PCS/MC 509. In 1998, Dr. O'Steen and Douglas Johnson wrote to Sen. McCain, explaining their opposition to his campaign

[30]The League of Women Voters of the United States (LWV) has similarly advocated for BCRA-style legislation and has run ads advocating it. For example, on October 2, 1997, the LWV issued a press release entitled "League Ads Target Maine for Key Campaign Finance Vote" and an ad transcript entitled "One Simple Message/Maine." 9 PCS/MC 1260, 1265 (*Affidavit of Lloyd Leonard on Behalf of League of Women Voters*). The press release explained that the radio ad targeted "Maine Senators Snowe and Collins [who were] regarded as key swing votes on the Lott amendment," which LWV wanted to defeat as a "'poison pill' amendment." *Id.*

finance legislation and refuting his assertion that such opposition was "ancillary" to NRLC's mission:

> [W]e emphatically disagree with your statement that these questions are "ancillary (if that)" to NRLC's main mission. In our view, if citizen groups' communications to the public had been restricted over the past 25 years in the ways that you have proposed in successive versions of your legislation, abortion would not be anything like the major *public policy* issue that it is today. Indeed, there are other nations which have elected legislatures, but in which elites of the political parties and news media have vastly more power to collectively exclude undesired issues from the political realm. Efforts to impose such false "consensus" have failed in this nation in large part because groups such as NRLC have been free to transmit to the public very specific information about specific politicians' positions and votes. [8 PCS/MS 487-91. (Letter from David O'Steen & Douglas Johnson to Sen. John McCain 5 (Feb. 17, 1998)).]

NRLC has aired advertisements in opposition to BCRA-style campaign finance legislation, and NRL-PAC has aired express-advocacy ads opposing candidates supporting such legislation. JA 640-644 (*NRLC Dec.* at ¶¶ 78-97 & referenced Exhibits).

In January 2000, Gov. Bush and Sen. McCain were seeking the Republican presidential nomination. NRLC used the occasion of national attention on these candidates to continue its long-term battle against BCRA-style legislation, just as Sen. McCain used his national attention to promote McCain-Feingold legislation.[31] On

[31]NRL-PAC also opposed Sen. McCain on the ground that he had an inferior pro-life record to the other Republican candidates, declaring no endorsement for any of the other candidates because all had "good pro-life positions." JA 643 (*NRLC Dec.* ¶ 92 & Ex. B-33). Sen. McCain promptly turned the issue into a campaign-finance debate issuing a press release erroneously claiming that these *PAC* ads were paid for with "soft money"

January 10, 2000, New Hampshire Citizens for Life and NRLC issued a press release declaring that their PACs were "launch[ing a] new radio ad campaign highlighting John McCain's attacks on free speech about politicians" and urging voters to "[l]et John McCain know that freedom of speech about politicians is not a joke. Vote for somebody else." JA 643-44 (*NRLC Dec.* ¶ 95 & Ex. B-36). In the same press release, these two organizations announced that they were also doing another PAC ad entitled "You Have a Right to Remain . . . Silent" that focused on McCain-Feingold legislation that would ban mentioning a federal candidate in a broadcast communication for 60 days before an election, as became law in BCRA. *Id.* The press release clearly noted the distinction between the express advocacy the PACs were doing and the issue advocacy done in the non-PAC ads. *Id.*

NRLC believes its activities are non-corrupting:

> NRLC does not believe any of its activities corrupt or appear to corrupt any federal, state or local candidates or officeholders. NRLC and its members have various interests that are served through communications and other activities with its members and the general public, and these political activities are necessarily funded with money. Indeed, NRLC believes that its activities, rather than creating an appearance of corruption, instill in the general public a sense of confidence that avenues for pursuing legitimate common interests are available to all. [JA 660-61 (*NRLC Dec.* ¶ 200).]

Common Cause ("CC) has had "Campaign Finance Reform . . . at the heart of what [it] does since its inception" in 1970. JDT

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and that his "campaign finance proposals would eliminate this kind of money from politics." JA 643 (*NRLC Dec.* ¶ 93 & Ex. B-34). NRL-PAC promptly issued a press release rejecting McCain's claim that a PAC ad could be paid for with "soft money." JA 643 (*NRLC Dec.* 93 & Ex. B-34).

Deposition of Matt Keller (CC Legislative Director) 17-18 (*CC Dep.*). "While it has done no *broadcast* ads – so it did no "electioneering communication" – CC has engaged in activities that could be interpreted as opposing or promoting candidates around election time. These should clearly be "corruption" under Defendants' broad definition of "corruption," because favored candidates might feel "gratitude" for CC's communications promoting issues the politicians support and praising them for doing so. Yet CC insists, under oath, that its communications are noncorrupting.

As the 2000 New Hampshire primaries approached, CC "staged an event with Senator[s] McCain and . . . Bradley around the issue of Campaign Finance Reform generally" and a pledge to support BCRA-style legislation particularly. JDT *CC Dep.* 105. An op-ed, published on CC's website, extolled McCain and Bradley as the presidential candidates who understood the need for BCRA-style legislation and who had pledged to enact it. JDT *CC Dep.* Ex. 20. The "purpose was to raise the visibility of the issue of Campaign Finance Reform," not to influence a federal election. JDT *CC Dep.* 106. CC acknowledged that it was "possible" that the op-ed piece could influence the federal election, but declared, "that was not [its] intent." JDT *CC Dep.* 107. It disavowed any "intention to support . . . candidates," only "the issue," although it acknowledged that "[a] possible effect of the support of the issue could be interpreted as support of the candidate." *Id.*[32]

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[32]CC, in its own name or though its Americans4Reform.com project, also financed a number of "Town Hall Meetings" or "Town Hall Forums" in New Hampshire and other states to promote campaign finance legislation, at least one such event coinciding with primary election campaigns and several mentioning (and some having present) candidates for Congress in the upcoming election, but CC stated there was no intent to influence any election or promote or oppose candidates (although in some cases it admitted the activity might be so viewed). JDT *CC Dep.* 116- 117 & Exhibit 23, p.2 (N.H., Jan. 13, 2000); JDT *CC Dep.* 132-36 & Exhibit 30 (Ark., Jan. 29,

Within 30 days of a primary election and while Gov. Bush and Sen. McCain were presidential candidates, CC distributed nationwide a press release about Bush's campaign finance proposals subtitled "Proposal 'Fails Test of Reform.'" JDT *CC Dep.* Ex. 22. The document described Bush's proposal as "flawed," "fail[ing] the test of reform," "not even-handed," and "a hodge-podge of half-steps which would do nothing to further real reform." *Id.* "The purpose ... was to encourage Governor Bush to propose a ... package that was ... truly reform," said CC, and "it's possible that this could influence[] a federal election." JDT *CC Dep.* 111-12. The statement did not "promote[] or support[] a candidate for federal office," CC testified, although a voter could so interpret it, and "it's possible to read that as opposing or ... attacking the proposal put forth by then Governor Bush." JDT *CC Dep.* 113. But, declared CC, it was not an attack on Governor Bush himself. *Id.*

Within 30 days of a primary election, while Sen. Gore was a presidential candidate, CC also distributed nationwide a press release about Gore's campaign finance proposals subtitled "Gore Sets Forth Innovative Plan for Reform."JDT *CC Dep.* 113-15 & Ex. 23. The release described Gore's proposal as "sending a strong statement," "innovative and promising," and "seek[ing] to seriously address [campaign finance legislation]." "Gore is putting forth strong reform proposals in contrast to ... Bush," CC declared. JDT *CC Dep.* Ex. 23. "The purpose of the press release," declared CC, "was to highlight ... that ... yet another candidate ... was making ... Reform a primary issue in his campaign," not to influence the

2001); JDT *CC Dep.* 136-39 & Exhibit 31 (Ill., Feb. 12, 2001); JDT *CC Dep.* 139-42 & Exhibit 32 (Tenn., Sep. 7, 2001).

election, although it "could" affect the election." JDT *CC Dep.* 115. CC didn't think the release promoted or supported Gore. *Id.*[33]

In March or April 2000, within 30 days of a primary in which Gov. Bush was a presidential candidate, CC distributed nationwide on its website an op-ed piece entitled "Bush's Campaign Finance Plan Too Weak." JDT *CC Dep.* 130-32 & Ex. 45. The plan derided Bush's plan as "keeping up with the Jones" and "rearranging the deck chairs on the Titanic," but CC affirmed no intent to influence the election (while acknowledging the communication would possibly do so) or attack or oppose candidate Bush (although it believed it could be so interpreted). JDT *CC Dep.* 131-32.[34]

On October 18, 2000, shortly before the general election, CC issued nationwide a press release announcing a "Reform Report Card" (grading members of congress on support for BCRA-style legislation) and listing signers of CC's "Public Integrity Pledge" (thereby promising to support CC's favored legislation). JDT *CC*

[33]After the 2000 Democratic and Republican conventions and while Senators Gore and Lieberman were presidential and vice-presidential candidates, CC released nationwide a press release extolling their commitment to campaign finance legislation and describing Lieberman as "a consistent and effective champion of campaign finance reform." JDT *CC Dep.* 117-20 & Exhibit 24. There was no purpose to influence the election or promote the named candidates, said CC, but this would possibly happen. JDT *CC Dep.* 119-20.

[34]CC also engaged "50 [to] 70 volunteers who c[a]me in to [CC] every week," JDT *CC Dep.* 151, in making phonebank calls to get CC members to call legislators about pending legislation. JDT *CC Dep.* 151-52 & Exhibits 41-43. Calls were made employing one phonebank memo into Delaware, in March 1998, urging Rep. Mike Castle to oppose a certain amendment. JDT *CC Dep.* 152 & Exhibit 42. Rep. Castle was a candidate in the November 1998 general election. The declared purpose was opposing a "phony" bill and supporting a proper one, not influencing an election (but CC admitted it possibly do so). JDT *CC Dep.* 152.

Dep. 119-21 & Ex. 25 & 27.[35] The scorecard included an "honor roll" of legislators voting CC's way. JDT *CC Dep.* 127 & Ex. 27. CC affirmed the scorecard's purpose was informing people about how legislators voted, JDT *CC Dep.* 122, and "encourag[ing] ... Members of Congress to vote [right] in the next vote," JDT *CC Dep.* at122-23, not influencing elections or promoting candidates, but it could be so interpreted. JDT *CC Dep.* 122-125.

Could these activities affect federal elections? CC declared "they could ... impact ... how people vote." JDT *CC Dep.* 156. Could they be viewed "as either attacking or defending or promoting an individual candidacy?" *Id.* "Yes." *Id.* But were these communications corrupting? CC declared that it did not "believe that if a Member of Congress, as a result of [CC's] communications, supported Campaign Finance Reform or whatever [CC] w[as] advocating" that "that [would] give rise to an appearance of corruption." JDT *CC Dep.* 155.

Campaign for America's ("CFA") purpose is promoting BCRA-style legislation. JDT *Telephonic Deposition of Cheryl Perrin* (CFA Executive Director) 9 (*CFA Dep.*). CFA is funded primarily or solely by its founder, Jerome Kohlberg, Jr. JDT *CFA Dep.* 10. CFA has broadcast numerous ads promoting BCRA-style legislation that mentioned elected officials, some of whom were candidates in an upcoming election. *See, e.g.*, JDT *CFA Dep.* Ex. D (joint press release and radio ad scripts by CC and CFA).

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[35]CC communicated to the public on a "case-by-case basis" about who signed the integrity pledge, including communications about who signed and didn't vote as CC wanted. JDT *CC Dep.* 127. Such communications were issued around the time of votes of campaign finance legislation, which could coincide with election campaigns. JDT *CC Dep.* 128. The declared purpose of such tactics was not to influence elections or promote or attack candidates, but to "try to get somebody's vote." *Id.* CC acknowledged that such activity could influence elections and could be interpreted as promoting or opposing candidates. *Id.*

CFA published a "Legislative Report Card" giving "Thumbs Up" to advocates of BCRA-style legislation, including Senators McCain and Feingold. JDT *CFA Dep.* Ex.C. CFA didn't intend to influence an election and didn't believe the report could do so. JDT *CFA Dep.* 26. CFA has also broadcast grass-roots-lobbying radio ads mentioning federal legislators by name and encouraging listeners to call these legislators and vote for BCRA-style legislation or to pressure leaders, e.g., Sen. Lott, to hear CFA's favored legislation. *See, e.g.*, JDT *CFA Dep.* 28-31 & Ex. D (press release and text of ads). CFA said that its purpose was educating the public and seeking support for BCRA-style legislation, not influencing elections, that these ads could not affect federal elections, and that the ads did not attack or support any named candidate. JDT *CFA Dep.* 30. CFA declared that, if a legislator did what CFA urged in its ads, that there was no corruption because "[t]here would be no gain for that on either side." JDT *CFA Dep.* 59-60.

If all the above activity sounds like the busy marketplace of ideas in a vibrant democracy, that is because it is. Some of it fell within the BCRA blackout periods, but any of it could have, depending on when legislative action was occurring. Much of this vital political activity would be lost if BCRA were upheld. And the fact that both "reform" groups and Plaintiffs engage in the same sort of activity belies any claim that the public perceives corruption in these activities. Indeed "reform" groups themselves do not view such activity as corrupting.

II. "Soft Money" Bans Are Unconstitutional . . .

The Title I nonfederal money bans are unconstitutional as to national parties, federal officeholders and candidates, and state officeholders and candidates.

A. As to National Parties. Libertarian National Committee (LNC) joins the Republican National Committee et al., brief. The description of the unique way in which BCRA burdens the LNC and legal arguments are provided there and adopted here.

B. As to Federal Officeholders/ Candidates.

Rep. Mike Pence[36] wants to raise money for nonprofit corporations, including Indiana Family Institute (IFI).[37] But BCRA Title I adds § 323(e)(1)(A), JSA 13a, prohibiting federal candidates or officeholders from soliciting for, or directing nonfederal funds to, nonprofit organizations for "federal election activity" (voter registration within 120 days of an election) and voter identification, get-out-the-vote (GOTV) activity, activity supporting political parties, or making a communications that "refers to" a federal candidate and "promotes or supports ... or attacks or opposes" her).

Section 323(e)(4)(A) permits making "a general solicitation of funds" for nonprofit organizations "that does not specify how the funds will or should be spent," provided that the "principal purpose" of the organization is not engaging in "federal election activity."

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[36]Rep. Pence is a Member of Congress who associates with nonprofit ideological corporations to assist them in raising funds, as more fully described in the *Declaration of U.S. Representative Mike Pence* ("*Pence Dec.*"), JA 662-67. Rep. Pence alleged that the BCRA chills his ability to assist IFI and other nonprofit ideological corporations. JA 663 (*Pence Dec.* ¶ 6). He has assisted in raising funds for organizations including IFI and Vanderburgh County Right to Life and want to continue the relationship. JA 662-67 (*Pence Dec.* ¶¶ 5-22).

[37]IFI is a § 501(c)(3), MCFL-type corporation that advocates pro-family issues in the public policy arena, as more fully set out in the *Declaration of Curt Smith, President of Indiana Family Institute, Inc.* (*IFI Dec.*), JA 813-14 (*IFI Dec.* ¶¶ 3-7). IFI has a longtime relationship with Mike Pence before he was in Congress, which relationship has been used to help raise funds for IFI, and IFI wishes to have Rep. Pence continue to assist in raising funds for IFI without the restrictions of BCRA. JA 814-15 (*IFI Dec.* ¶¶ 8-11).

Section 323(e)(4)(B) provides that candidates may also make solicitations for "federal election activity," except a communication that "refers to" a federal candidate and "promotes or supports ... or attacks or opposes" her, or for organizations whose principal purpose is to engage in such activity, provided the solicitation is made only to individuals[] and [] the amount solicited from any individual does not exceed $20,000."

The district court upheld this provision. SA 5sa (Per Curiam). Judge Henderson decided that the provision passed strict scrutiny because candidates raising large sums of non-federal money from corporations could create the appearance of corruption, SA 455sa, and "severing the most direct link between the federal candidate and the non-federal donor ... can serve to prevent the appearance of corruption where it is most acute." SA 457sa. She also decided that this may be the least restrictive means of preventing the use of soft money to buy influence over officials. SA 458sa.

Central to Rep. Pence's claim is the fact Rep. Pence has had a ten year relationship with IFI, both he and his wife have served on the IFI Board of Advisors, they have supported IFI financially, and he has been a featured guest and speaker at IFI fundraising events, because he believes in IFI's mission to focus on traditional family values. JA 662-63 (*Pence Dec.* ¶ 5). Rep. Pence and IFI want to continue the relationship they had before he became a Member of Congress, with Rep. Pence free to raise funds for IFI without restrictions. Because the relationship preexisted Rep. Pence's election to Congress in 2000 and Rep. Pence's present candidacy, JA 662 (*Pence Dec.* ¶ 2), there is no realistic concern that the public will perceive quid pro quo corruption in the fundraising relationship – even if he raised money for a pro-family or pro-life nonprofit corporation to register, identify, and mobilize voters.

But there is also a problem with what BCRA permits Rep. Pence to do. Fundraising events commonly include a presentation on the past or planned activities of the organization, either as an oral presentation (often with audio-visual enhancement) or in printed form to show what potential donors are supporting by their past and anticipated contributions. These activities often include (a) public communications (such as grassroots lobbying, issue advertising, and voter guides) that refer to a clearly identified candidate for federal office; (b) voter registration within 120 days of a federal election, voter identification, and GOTV activity. JA 664-65 (*Pence Dec.* ¶¶ 12-14).[38]

Rep. Pence's urging of support for such organizations may readily be considered by listeners to be a solicitation for funds that will be spent on the "federal election activities," described in oral or written presentations of past and planned activities of the group at the fundraising event, even if Rep. Pence expresses support for the group in general terms and does not specify how the funds will be spent. JA 665-66 (*Pence Dec.* ¶ 16). Further, it is unclear whether the "principal purpose" of an expressive association such as IFI or Vanderburgh County Right to Life is to engage in "federal election activity," because "principal purpose" is not defined by the BCRA. Must the activity be *a* principal purpose or *the* principal purpose? Does "principal purpose" means the same as "major purpose," the

[38]Rep. Pence spoke at Vanderburgh County Right to Life's annual fundraising banquet, and VCRTL engages in a wide range of these activities with respect to federal, state, and local elections. IFI engages in some of these activities and has asserted its intent to continue doing so and to expand into doing more of these activities. JA 664-65 (*Pence Dec.* ¶¶ 9-11, 14). Some expressive associations also engage in independent expenditures in connection with federal candidates, with or without a connected political action committee ("PAC"), and some make contributions through their PACs to federal candidates. JA 665 (*Pence Dec.* ¶ 15).

term used by this Court in *MCFL*, 479 U.S. 238? JA 666 (*Pence Dec.* ¶ 17).

The requirement that "the amount solicited from any individual during any calendar year does not exceed $20,000" is by its terms a limitation on *solicitation*, not *contribution*, and unconstitutionally exposes Rep. Pence to liability for asking individuals for a $20,000 contribution when the individual has already been solicited for a contribution *of any amount* in that calendar year. This is exacerbated by the fact that Rep. Pence's solicitations are typically done to groups, where it is impossible to know who is in the audience and what solicitations have been made already to them. JA 667 (*Pence Dec.* ¶ 21).

No corruption or appearance of corruption exists in the activity described. This Court protects issue advocacy expenditures by citizen's groups and Congressmen have a legitimate interest in associating with such groups to advance the public issues common to them. Further, nonpartisan voter registration and GOTV activity furthers important civic goals. Since none of this activity is conducted in a partisan manner or advocates the election or defeat of any particular candidate, the connection between any prospect of quid pro quo corruption and the soliciting of funds for this activity is just too tenuous.

C. As to State Officeholders/Candidates. As a candidate for Alabama Attorney General, William H. Pryor Jr. has made many political communications and associations which are permitted by the laws of his state, but are restricted by BCRA. In violation of § 323(f) and § 301(20)(A)(iii), he has made public communications as a candidate and state official that refer to candidates for federal office and that promote, support, attack or oppose such candidates. JA 705-07 (*Declaration of William H. Pryor Jr., Attorney General of Alabama* (*Pryor Dec.*) ¶ 3, Ex. A-B). His references

to candidates are made to compare his views to those of the federal candidate or because his official position effectively requires it. JA 707-08 (*Pryor Dec.* ¶¶ 4-6). He has also received contributions from state committees of national political parties and has spent state-regulated funds for voter registration within 120 days of a federal election, for voter identification and GOTV, and for generic campaign activities. JA 708-10 (*Pryor Dec.* ¶¶ 7-11).

Pryor's official duties often require him to discuss federal candidates in official press releases, congressional testimony, correspondence with public officials, and legal briefs. JA 705-08 (*Pryor Dec.* ¶¶ 3-5, Ex. C-O). "To fulfill my office as Attorney General effectively, I must often refer to federal candidates because they offer legal proposals which must be analyzed and would affect state law and policy and because they often become involved in legal controversies." JA 708 (*Pryor Dec.* ¶ 6).

By regulating the activities of candidates for state elective office, the BCRA is interfering with the ability of states to enact their own campaign finance schemes and has greatly complicating the burden of campaign finance laws on such candidates by subjecting them to two separate and often contradictory regulatory schemes. If the restrictions on "federal election activities" preempts state regulation, differences between state and federal approaches will be confusing and undermine the state's ability to design a logical and consistent scheme.[39] For example, Pryor's state of Alabama does not follow the federal approach of limiting the size of non-corporate contributions, but instead forbids them from being made while the Legislature is in session. Ala. Code § 17-22A-7(b)(2). If the federal law

[39] State laws are pre-empted by (1) "express language in a congressional enactment," (2) "implication from the depth and breadth of a congressional scheme that occupies the legislative field," or (3) " implication because of a conflict with a congressional enactment." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001).

preempts Alabama law, an ad by Pryor urging voters to support him because he "helped President Bush fight the war on terror" would be subject to federal law limiting the size of contributions but not to Alabama's timing restriction, while an ad that does not mention a federal candidate could be paid for only by funds raised outside the legislative session, but from contributions of unlimited size. The impact could be even greater in states with similar but more restrictive laws. Hence, adding phrases like "I'm a Bush Republican" to their communications would enable Montana state legislative candidates to exchange their state's $100 per donor contribution limit with BCRA's limits of $2,000 or $5,000. Mont. Code Ann. § 13-37-216.

An even worse result would occur if these communications were subject to both state and federal restrictions. Pryor's communications showing him with President Bush would then be subject to the more restrictive aspects of both the federal and Alabama schemes. Montana candidates would need to ensure that their contributors had complied with federal limitations on contributions from political committees and individuals, but also raised outside of a legislative session, as required by Alabama law.

This impact would be especially acute in states providing public financing to candidates foregoing most private contributions. A Maine state representative candidate is barred from public funding for accepting more than $500 of private contributions. Me. Rev. Stat. Ann. tit. 21A § 1125(2)(C). A Maine state candidate wishing to spend $600 to tout his experience as a legislative staffer for Sen. Snowe, which now must be raised in accordance with federal law, would need to forego state financing to do so. If BCRA preempts state law, the candidate could raise unlimited private funds, subject to the much higher federal contribution limits, and still be eligible for public funding, if he spent the funds on ads mentioning Sen. Snowe

Besides being complicated and burdensome to state candidates, this subjection to federal regulation is also unfair in its impact on individual candidates. Consider the potential matchup in Indiana's 2004 gubernatorial election between Mitch Daniels, formerly President Bush's budget director, and Joe Andrews, former chairman of the Democratic National Committee.[40] Because President Bush is a candidate for re-election, Daniels would need to raise federal funds in order to discuss his work in the Bush administration or to tout an endorsement from his old boss. However, Andrews could freely use state-regulated funds to discuss his work with former President Clinton.

Restrictions based on the content of a candidate's speech violate this Court's maxim that it is the "people individually as citizens and candidates ... who must retain control over the quantity and range of debate on public issues in a political campaign." *Buckley*, 424 U.S. at 57. Restricting candidates' speech is especially troublesome because "[t]he role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." *Republican Party of Minnesota*,536 U.S. at 781-82. In the rare instances when candidates are subjected to content-based restrictions, the government bears the burden to prove that the challenged regulation is "narrowly tailored, to serve ... a compelling state interest." *Id.* at 774-75. The government "must demonstrate that it does not 'unnecessarily circumscribe protected expression.'" *Id.* at 775 (citation omitted). When a plausible, less restrictive alternative is offered to a content-based speech restriction – such as the state regulatory schemes that already govern these communications – "it is the Government's obligation to prove that the alterna-

[40] Matthew Tully, *Daniels Dives In; Rival Bows Out*, Indianapolis Star, June 10, 2003, <http://www.indystar.com/print/articles /2/049677-9902-098.html>.

tive will be ineffective to achieve its goals." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000).

In upholding these provisions, the district court, in Judge Leon's opinion, relied upon findings regarding the activities of state political parties supporting federal candidates to find that this statute was closely drawn to accomplish the federal purpose of "guarding against similar conversions of soft money donations to fund communications that are designed to accomplish the federal purpose of directly influencing a federal election." SA 1146sa. But the mere potential that these statements could be used to influence a federal election is insufficient justification. This Court has long recognized that "[c]andidates ... are intimately tied to public issues," *Buckley*, 424 U.S. at 42, and that the governments' regulatory interests extended only to spending that is "unambiguously related to the campaign of a particular federal candidate." *Id.* at 80. Despite this Court's warning that "the Government must present more than anecdote and supposition" to prove the necessity of such statutes, *Playboy*, 529 U.S. at 822, there is no support in logic or evidence for the premise that state candidates are likely to divert their scarce campaign resources to support federal candidacies rather than their own. State candidates invoke the name of federal candidates in order to *advance their own candidacies*, a point illustrated by Pryor's own flyers featuring pictures of him shaking hands with President Bush, citing his work on the President's prior campaign and transition team, and quoting praise for Pryor from the President and from Alabama's senators. 8 PCS/MC 36-45 (*Pryor Dec.* Ex. A & B).

Even more dubious are the restrictions on supposedly "federal election activity" by state officeholders – an application ignored by the district court. It is hard to imagine what federal interests could justify requiring state officials to fund official communications with private campaign contributions rather than with public funds

authorized by their state legislature. As Pryor explained, "My official duties would be significantly impeded if I were unable to refer to federal candidates who sponsor or propose legislation or who are involved in litigation that might affect the people of Alabama." JA 707-08 (*Pryor Dec.* ¶ 5). Ironically, by requiring campaign donors to pay for communications normally funded by taxes, this provision enhances rather than reduces the role of money in politics.

III. "Advance Notice" Is Unconstitutional.

BCRA provides two advance notice disclosure provisions, requiring that contracts be treated as actual expenditures. The district court found the challenge to § 212 not ripe because of FEC regulations requiring disclosure only after an independent expenditure has been made. SA 132sa (Per Curiam). NRLC Plaintiffs do not appeal this. Section 201(5), JSA 23a, also requires such advance notice for contracts to make electioneering communications, which the Court unanimously found unconstitutional. SA 12sa, 115sa (Per Curiam).

Advanced notice of a communication about a politician, by requiring the reporting of "contracts" for the communication, creates three separate, but substantial problems. First, the disclosure of donors subjects these donors to harassment.[41] Second, it is often

[41]The district court upheld the requirement that $1,000 (and up) contributors for electioneering communications be reported, despite concerns about retaliation and harassment expressed by several plaintiffs. SA 124sa (Per Curiam) (citing "lack of specific evidence"). There was evidence in the record of harassment against NRLC and NRL PAC and interference with broadcast advertising arrangements when candidates become aware of such communications. JA 632 (*NRLC Dec.* ¶¶ 26-27, which is summarized *infra* at note 43).

Also, in *Arizona Right to Life PAC v. Bayless*, No. 00-CIV-0129-PHX-RGS, slip op. at 10 (D. Ariz. Aug. 28, 2000), *rev'd in part on other grounds*, 320 F.3d 1002 (9th Cir. 2003), the court in the process of granting permanent injunction against a requirement "that *individual* contributor's names and

unknown in advance whether the communication will actually be made and what the communication, or even the "contract" will cost.[42] Third, advance notice of a communications provide an opportunity for politicians to dissuade broadcasters and newspapers from carrying communications to which they object.[43]

telephone numbers be included on the literature or advertisements of political committees who make independent expenditures," *id.* at 19 (emphasis in original), recounted the evidence submitted by one top contributor who had "received harassing phone calls – some threatening violence – during the 1998 political campaign as a result of the publication of his phone number." *Id.* at 10.

[42]Two examples from nonbroadcast advocacy illustrate the point. First, NRL PAC planned an independent expenditure on printed express advocacy pieces in support of U.S. Senate candidate John Ashcroft in the 2000 Missouri election. When Ashcroft's opponent died, NRLC did not think it seemly to release the brochures, electing to spend its money on other races. Both contracts and payments were made, but there was no communication, and it would have been inaccurate and misleading to have such "expenditures" reported as "independent expenditures." *See NRL PAC v. Connor*, 323 F.3d 684 (8th Cir. 2003) (recounting these facts).

Second, NRL PAC often arranges for telemarketing firms to make phone calls into targeted areas at election time. The general agreement is made well in advance of the election, but the agreement is only for a set range of expenditures (low and high ends) and the rate per call. At this point, the amount of money that will be available to spend is yet unknown, for it has not been raised yet, and the state or races are unknown. In fact the state or race may not be decided until the day before the phone calling begins, as last-minute polling indicates where there is a need. Thus, at the time of the agreement for telemarketing services, the total amount to be spent is yet unknown, as is the location of the calls.

[43]A concrete example occurred to NRL PAC in 1988 in Nevada. James Bopp, Jr. & Richard E. Coleson, *Comments on Proposed Rules at 11 C.F.R. Parts 100, 104, and 109 Regarding Independent Expenditure Reporting*, <http://www.fec.gov/pdf/nprm/ind_exp/ind_expcomments6-08-01.pdf> (visited July 1, 2003); *NRLC Dec.* (¶¶ 184-200), JA 658-61. It involves the case of *National Right to Life PAC v. Friends for Bryan* (No. CV-S-88-865-PMP-(RJJ)), a 1988 case brought in state court by NRL PAC against Nevada

Advance notice provides increased opportunity for such mischief, at the expense of First Amendment rights. If broadcasters can be intimidated into canceling advertisements that are already in process (as were NRL PAC's, note 42), it will be far easier for intimidation to prevail with the extra time advanced notice provides. Many broadcasters would be tempted to reject such communications, depriving citizen groups of free speech. The ability of Americans to participate in our democracy would be undermined.

IV. Intervenors Lack Article III Standing.

Senator John McCain, Sen. Russell Feingold, Rep. Christopher Shays, Rep. Martin Meehan, Sen. Olympia Snowe, and Sen. James Jeffords (Intervenors) intervened as Defendants in the District Court under Fed. R. Civ. P. 24(a)(1), invoking § 403(b) ("any member of the House of Representatives . . . or Senate shall have the right to intervene either in support or opposition to the position of a party to the case regarding the constitutionality of the provision or amendment"). In granting intervention, the trial court decided the Intervenors have Article III standing whether or not such standing is required for intervention. Docket # 40 (order granting intervention

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Governor Richard Bryan's U.S. Senatorial campaign committee for tortuous interference with contractual relations resulting from cancelled broadcast arrangements for NRL PAC's independent expenditures due to harassing letters from Bryan's campaign. Other letters using the same boilerplate language were used in North Dakota and Nebraska and the source of this systematic campaign of intimidation was apparently an October 21, 1988, form letter prepared by Robert F. Bauer, Counsel to the Democratic Senatorial Campaign Committee. Similar letters were also sent to stations concerning ads by the American Medical Association PAC and the Auto Dealers and Drivers for Free Trade PAC. This evidence demonstrates what is usually invisible to the public – a widespread practice of well-planned, systematic intimidation attempts against broadcasters to gain political advantage.

5 (May 3, 2002)). However, Article III standing is required for intervention[44] and the Intervenors lack it.

The Intervenors must satisfy both constitutional and prudential requirements for standing. *See, e.g., National Credit Union Admin. v. First National Bank & Trust Co.*, 522 U.S. 1146 (1998); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Section 403(b), by permitting members of Congress to intervene, removes any prudential standing concerns. *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997) ("Congress's decision to grant a particular plaintiff the right to challenge an act's constitutionality ... eliminates any prudential standing limitations and significantly lessens the risk of unwanted conflict with the Legislative Branch when the plaintiff brings suit"). However, "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue a plaintiff who would not otherwise have standing." *Id.* Contrary to the District Court, Intervenors lack Article III standing.

First, they do not satisfy the requirement that one must suffer an "injury in fact," consisting of an "invasion of a legally protected interest which is (a) concrete and particularized ... and (b) actual or imminent." *Lujan*, 504 U.S. at 560 (internal quotations and citations omitted). The Intervenors claimed injury here – "that they will be forced to raise money in a corrupt system *in the event the Act is struck down*" (Order at 8) (emphasis in original) – is neither concrete nor particularized.

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[44]Whether proposed Intervenors must have Article III standing in order to properly intervene is an issue of first impression, *Diamond v. Charles*, 476 U.S. 54, 68-69 and n. 21 (1986), and there is a conflict of circuits in this regard. *Compare Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 101 F.3d 503, 507 (7th Cir. 1996); *Mausolf v. Babbit*, 85 F.3d 1295, 1300 (8th Cir. 1996); *Building and Constr. Trades Dept., AFL-CIO v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir.1994) *with United States Postal Serv. v. Brennan*, 579 F.2d 188, 190 (2d Cir.1978); *Associated Builders & Contractors v. Perry*, 16 F.3d 688, 690 (6th Cir.1994); *Yniguez v. State of Arizona*, 939 F.2d 727, 731 (9th Cir.1991).

In *Raines*, 521 U.S. at 829, this Court held that individual Members of Congress lacked standing to challenge the constitutionality of the federal Line Item Veto Act, although the Act explicitly provided that any Member might bring suit against it, because the Members had alleged no cognizable injuries particular to themselves, and their claimed institutional injury was widely dispersed and abstract. The Intervenors claim here – that without the BCRA, they will have to raise funds in a supposedly corrupt system – lacks particularity and concreteness to an even greater degree than the claim of the *Raines* plaintiffs. A line item veto is at least known to diminish the specific weight of every legislative vote. This is surely a more concrete and particular injury than swimming in the same allegedly polluted fund-raising water as all other candidates must if BCRA is stricken. If the Raines plaintiffs lacked standing, the Intervenors lack it, too. If the Intervenors here have standing, then so do all legislators whenever any statute that affects them is brought into question before the courts, which would elide the entire meaning of the "case and controversy" requirement.[45]

Second, the Intervenors lack Article III standing because there is no causal connection between their "injury"and the conduct complained of. *Lujan*, 504 U.S. at 560-61. Their claimed injury would arise from the unregulated conduct of other parties. However, "[i]n those cases where a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (*or lack of regulation*) of someone else, it is substantially more difficult to establish injury in fact, for in such cases one or more of the essential elements of standing depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *Common Cause v. FEC*, 108 F.3d 412, 417 (D.C. Cir. 1997) (quotations and citations omitted) (emphasis added).

[45]In *Karcher v. May*, 484 U.S. 72, 78 (1987), this Court held that New Jersey legislators had standing to defend a statute that the state's Attorney General refused to defend, if they acted "in their official capacities as presiding officers on behalf of the . . . Legislature," but lost standing when acting as individual legislators. *Id.* In *INS v. Chadha*, 464 U.S. 919, 930, n.5 (1983), this Court held that Congress was a proper party to defend a one-House veto provision when a government agency refused to defend the provision and both Houses authorized the intervention of Congress to defend the provision. But Intervenors here have not intervened in any official capacity, only as individual legislators. And BCRA is actively and ably defended by the government.

However, "because an intervenor participates on equal footing with the original parties to a suit, a movant for leave to intervene ... must satisfy the same Article III standing requirements as original parties." *Building and Constr. Trades Dept., AFL-CIO*, 40 F.3d at 1282 (citations omitted). As the Eighth Circuit held:

> [A]n Article III case or controversy, once joined by intervenors who lack standing, is – put bluntly – no longer an Article III case or controversy. An Article III case or controversy is one where all parties have standing, and a would-be intervenor, because he seeks to participate as a party must have standing as well. The Supreme Court has made it very clear that "[those] who do not possess Art. III standing may not litigate as suitors in the courts of the United States." [*Mausolf*, 85 F.3d at 1300 (citation omitted)].

The Article III standing requirement cannot be mitigated by Congress. Congressional power to create standing is subject to the limitations of Article III. *See, e.g., Warth v. Seldin*, 422 U.S. 490 (1975); *Linda R.S. v. Richard D.*, 410 U.S. 64 (1973). Article III's injury in fact requirement limits Congress' power to confer standing. *Lujan*, 504 U.S. at 580-81 (Kennedy, J., concurring). "In no event ... may Congress abrogate the Art. III minima." *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979). Thus,

Article III standing is required for intervention. Because Intervenors lack standing, the intervention grant must be reversed.

Conclusion

For the foregoing reasons, this Court should strike down Title I's bans on "soft money" use by political parties, federal officeholders and candidates, state officeholders and candidates, Title II's ban on "electioneering communications," and § 201(5)'s "advance notice" requirement as violating constitutional free expression and association guarantees. Also, this Court should hold that the grant of intervention to Sen. Mc Cain et al. was erroneous.

Respectfully submitted,

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